United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1079

To be argued by
THOMAS E. ENGEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1079

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOSEPH F. VALVERDE, III,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Joseph F. Valverde, III appeals from a judgment of conviction entered on January 27, 1976 in the United States District Court for the Southern District of New York after a six-day trial before the Honorable Thomas P. Griesa, United States District Judge, and a jury.

Indictment 75 Cr. 745, filed July 28, 1975, charged Valverde, Samuel Glasser, Eugene Piper, Martin Kreiman, Steven Greenstein and Tom Zuk with violations of the federal narcotics laws.* Count One charged all six defendants with conspiracy to violate the federal nar-

* Indictment 75 Cr. 745 superseded Indictment 75 Cr. 189, filed February 25, 1975, adding the defendant Zuk in the conspiracy count and independently in two substantive counts.

cotics laws in violation of Title 21, United States Code, Section 846. Count Two charged Valverde, Glasser, and Piper with distributing approximateiy three ounces of cocaine in July or August, 1974. Count Three charged Valverde, Glasser and Piper with distributing approximately ten ounces of cocaine in November or December, 1974. Count Four charged Kreiman and Greenstein with distributing approximately two ounces of cocaine in November or December, 1974. Count Five charged Zuk with distributing approximately two ounces of cocaine in November or December, 1974. Count Six charged Zuk with distributing approximately ten ounces of cocaine on February 6, 1975. Count Seven charged Valverde, Glasser, and Piper with distributing approximately two and a half pounds of cocaine on February 6, 1975. Count Eight charged Kreiman and Greenstein with distributing approximately two pounds of cocaine on February 6, 1975.*

Trial commenced against Valverde and Glasser on December 4, 1975** and concluded December 15, 1975 when the jury found both defendants guilty on Counts One, Three and Seven.***

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* Counts Two through Eight charged violations of Title 21, United States Code, Sections 812, 841(a)(1), and 841(b)(1)(A).

** Piper, Kreiman, Greenstein, and Zuk pleaded guilty prior to trial.

Piper received a three-month term of imprisonment and a three-year special parole term. Kreiman and Greenstein both received 30-day sentences with three-year special parole terms. Zuk received a suspended sentence.

*** The jury returned a partial verdict of guilty on Counts One, Three, and Seven and stated it wished to continue deliberations on Count Two. The parties agreed to stop the deliberations at that point, however, when the Government stated it would file a *nolle prosequi* as to Count Two.

On January 27, 1976, Valverde and Glasser were both sentenced to terms of imprisonment of four years to be followed by three-year special parole terms.

Valverde is at liberty pending the determination of this appeal. Glasser has withdrawn his appeal and is serving his sentence.

Statement of Facts

The Government's Case

The narcotics conspiracy that was charged in the indictment and overwhelmingly proved at trial consisted of a chain of cocaine distribution that began with the importers Valverde, a businessman, and Glasser, an attorney, and then continued through the wholesaler Piper to the distributors Kreiman, Greenstein, and Z. . The cocaine, which was of extraordinarily high quality,* originated in South America in paste form and was brought to the United States where it was chemically refined, packaged and distributed, principally in New York. The proof of the conspiracy came from two participants, Piper and Greenstein, a number of consensually tape-recorded telephone conversations, and numerous exhibits seized from Valverde's apartment after his arrest.

A. The Valverde-Glasser Partnership Recruits Piper

In October, 1973, Samuel Glasser told his brother-in-law Eugene Piper ** that he had some cocaine, and asked

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* Government Exhibit 2 introduced at trial contained approximately a half-kilogram of cocaine of 96.8% purity.

** Piper's sister Kelly married Glasser in October, 1971. Piper had known Glasser since 1966, however, when Kelly and

[Footnote continued on following page]

Piper if he would like to sell it. Piper told Glasser that he knew people who used cocaine and would be willing to act as a salesman. (Tr. 172).* Piper then went to a suite in the Mayfair House on Park Avenue and 65th Street in Mahattan that Glasser and Valverde were then renting. There, Piper received one or two ounces of cocaine from Glasser, in Valverde's presence, and later sold it (except for some which he used himself)** in quarter or half-ounce quantities (Tr. 178-79, 238).

From late 1973 until February 1975, Piper purchased, on a consignment basis, cocaine from Valverde and Glasser at approximate three-month intervals, each time the pair returned from South America. (Tr. 181, 186-87). Piper in turn made arrangements at the bar where he worked as a waiter to sell the cocaine to patrons of the bar. (Tr. 182-83).

B. The Des Moines, Iowa Delivery

In late 1973, Piper was asked by Glasser and Valverde to fly to Des Moines, Iowa to deliver a pound of cocaine. Glasser and Valverde told Piper that the de-

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Glasser began dating each other. (Tr. 170-171). During late 1970, while Piper was a student at Columbia, he shared some cocaine with Glasser. (Tr. 173). Piper met Valverde in 1972. Valverde was a college friend of Glasser at Cornell and later a business associate of Glasser in Vintage Vendors, a wine importing concern. (Tr. 179-80).

* "Tr." refers to the trial transcript; "S." refers to the transcript of a suppression hearing held April 29 and May 1, 1975; "GX" refers to Government Exhibits at trial; "SGX" refers to Government Exhibits at the pre-trial suppression hearing; "DX" refers to defense exhibits at trial; "Br." refers to Valverde's brief on appeal; and "App." refers to Valverde's appendix on appeal.

** Piper regularly used cocaine when it was available to him. (Tr. 187, 235-37).

livery would be a test of Piper's reliability. Glasser explained that a black man would approach Piper as he got off the airplane. This man was to be the "connection." (Tr. 238-40).

Piper was met in Des Moines by the black man as planned, and Piper gave him the cocaine. (Tr. 240). Afterward, Piper stayed overnight in a Holiday Inn.* The black man later came to the motel and told Piper that the cocaine was of good quality. Piper returned to New York the following morning and saw Valverde and Glasser who paid him for the delivery and his expenses. (Tr. 241-42).

Piper received three ounces of cocaine from Valverde and Glasser on two other occasions at the Mayfair House prior to April, 1974. On one of these occasions Piper paid Valverde $3000 for the cocaine after selling it. Valverde then paid Piper $600 as Piper's profit on the sale. (Tr. 243-46).

C. Glasser and Valverde Relocate to the Regency

On August 6, 1974, Piper again visited Valverde and Glasser who by this time had been thrown out of the Mayfair House and were renting a suite at the Regency Hotel.** Piper received eight or ten ounces of cocaine

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* A registration card from the Holiday Inn, 2101 Fleur Drive, Des Moines, Iowa showing that Piper stayed overnight there on December 7-8, 1973 was received into evidence. (Tr. 667; GX 59).

** James D. O'Sullivan, general manager of the Mayfair House, testified and introduced registration cards showing that Glasser and Valverde were tenants at the Mayfair from December, 1973 to April 30, 1974. O'Sullivan testified that they always paid their bills in cash at a monthly rate exclusive of services of $1350. (Tr. 494-502). Sometime after this Glasser and Valverde attempted to re-register at the Mayfair but were turned away. (Tr. 505-06).

from Glasser and Valverde at a price of $900 per ounce and sold the cocaine to Martin Kreiman, Steven Greenstein * and Tom Zuk. He later paid Glasser and Valverde $7200. (Tr. 246-47).

In late 1974 Piper purchased four ounces of cocaine from Glasser and resold it. On another visit to the suite at the Regency, Piper purchased six or eight ounces from Glasser and Valverde and sold it again to Kreiman, Greenstein and Zuk. (Tr. 248-50).**

D. The Final Transaction

1. Preparations

In late January, 1975, Glasser called Piper on the telephone from Florida *** and told him to tell his customers that another shipment had come in. Piper called Kreiman and informed him that a shipment was due in early February. Kreiman said he could purchase a half kilogram or perhaps a whole kilogram. Piper then spoke again with Glasser on the phone and relayed Kreiman's order. (Tr. 255-56).

On February 6, 1975, Piper met Glasser outside his sister's apartment on 62nd Street where Glasser handed

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* Greenstein, who had pleaded guilty, testified for the Government at trial and corroborated Piper's recounting of these transactions. (Tr. 87, 88, 91-92).

** At approximately the same time Glasser told Piper that he and Valverde had been to Bolivia where they had had trouble with one of their connections, a chemist and that Valverde had had a gun which had come in handy in the difficult situation. (Tr. 252-53).

*** Glasser and Valverde had told Piper that it was easier to bring cocaine into the country in Florida than in New York. (Tr. 254).

Piper a shopping bag containing approximately ten envelopes of cocaine weighing over a kilogram. Piper was told by Glasser to weigh the cocaine and sell as much as he could to his customers. (Tr. 257).

Piper took the cocaine to Kreiman's and Greenstein's apartment and weighed out two half-kilo packages.* (Tr. 96, 258). Valverde and Glasser wanted $30,000 for the kilogram, but Kreiman and Greenstein were unable to pay Piper immediately. Piper called Glasser and obtained permission to deliver the kilogram on credit. (Tr. 100-02, 260).

Kreiman and Greenstein then attempted to sell the cocaine to two persons named John and Eddie, proprietors of a shoe store on the upper East Side, who were working as informants for the Drug Enforcement Administration, and to a third person, Daniel Pavichevich, known only as "Dan" to Greenstein, who was a DEA undercover agent. (Tr. 76, 95, 103). Greenstein provided a sample to Pavichevich on February 8, 1975 and agreed to meet again on Monday, February 10. (Tr. 104-06). On February 10, Greenstein was arrested when he tried to sell eight ounces of the cocaine to Agent Pavichevich. (Tr. 75-76, 106).

2. Greenstein cooperates

Just hours prior to Greenstein's arrest, Piper had gone to Greenstein's apartment to retrieve one of the half kilograms on order from Glasser who was concerned because Piper's customers had not yet paid for any part of the kilogram delivery. (Tr. 261-62). After

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* Piper later delivered the remaining quarter-kilogram to Tom Zuk.

Greenstein's arrest Kreiman * called Piper to warn him that he should get the narcotics out of his apartment. Piper in turn called Glasser who came to Piper's apartment the following morning, picked up the second half-kilogram and told him he was leaving for Florida but would return at the end of the week. (Tr. 262-63).

After his arrest Greenstein cooperated with DEA agents and made phone calls to Piper to negotiate for the purchase of the second half kilogram which Piper had earlier supplied to Greenstein. Greenstein and Piper negotiated for the second half kilogram during four telephone conversations over the next few days, and it was agreed that, upon the return of Piper's source (Glasser) from Florida, the deal would be consummated.** Piper in turn spoke with Glasser in Florida to inform him of the progress of the negotiations. (Tr. 265-67). Glasser returned to New York on February 13, 1975 and called Piper the following morning.

Piper met Glasser and Valverde in Apartment 5 D, 205 East 63rd Street at approximately noon or one o'clock. (Tr. 269). The three of them snorted some cocaine and then went to lunch at a restaurant. After lunch, Piper left Valverde and Glasser and went to Greenstein's apartment where he received $10,000 from

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* Although Greenstein cooperated with DEA, he did not implicate Kreiman. Kreiman was only implicated after Piper's arrest and cooperation.

** The four telephone conversations between Piper and Greenstein on February 11, 12, 13, and 14, 1976 were recorded by DEA agents with Greenstein's consent. Tapes of the conversations, as well as transcripts thereof, were introduced in evidence at trial. (Tr. 122, 266-67; GX 5, 5A, 6, 6A, 6B, 7, 7A).

Greenstein for the half kilogram that had been ordered.* (Tr. 276; GX 1, 1A). Greenstein told Piper that the remaining $20,000 that he owed Piper would be paid when Piper returned with the cocaine. (GX 1, 1A).

Piper returned to the 63rd Street apartment with the $10,000. Unbeknownst to Piper, he was followed by DEA agents. Upon his arrival, Piper paid the money to Valverde, who counted it on a coffee table. Valverde, Glasser and Piper then sniffed some cocaine which was described by Valverde and Glasser as a sample of a future supply in March. Glasser then directed Piper to a brown legal envelope containing the second half kilogram of cocaine. The envelope was the same one Piper had given Glasser a few mornings earlier when Glasser left for Florida. (Tr. 285-87; GX 3).**

Piper left the apartment again followed by DEA agents. ~~Agent~~ Piper hailed a cab and rode north to

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* DEA agents had set up recording equipment in Greenstein's apartment and recorded the conversations. A tape of these conversations, and a transcript thereof, were introduced in evidence at trial. (Tr. 279; GX 1, 1A).

The $10,000 was Official Advance Funds the serial numbers of each bill of which had been pre-recorded by DEA agents. (Tr. 585-86; GX 55, 55A, 55B).

** When Piper had returned to Valverde's and Glassers apartment on the fifth floor of the 63d Street apartment, the agents did not enter the apartment elevator with him, and therefore did not immediately know which apartment he had entered. The agents, however, watched the indicator on the elevator and knew Piper had gone to the fifth floor. They then took the elevator themselves, and Agent Jeffrey Hall listened at various apartment doors for conversation. When Hall neared apartment D, he heard some conversation with a man named "Joe" (Valverde) about a load or shipment coming on March 10th and heard the word "grams." (Tr. 405-06). See *infra* at 38-40.

82nd Street where the cab was stopped by the agents and Piper was arrested in possession of the half kilogram of cocaine. (Tr. 288, 574; GX 2).

3. The Valverde and Glasser arrests

Piper agreed to make two telephone calls to Valverde and Glasser from a pay phone.* Piper told Glasser that his purchaser was going to be about "a thousand short." Glasser told Valverde who was in the room about the problem. After a brief conversation between Valverde and Glasser, Glasser asked whether there were "any serious problems" (*i.e.*, had anyone been arrested), and Piper said "no". (GX 4, 4B).

Piper then returned to the 63rd Street apartment, accompanied by DEA agents. Contrary to prior instructions of the agents who waited outside the door, Piper immediately told Valverde and Glasser that he had been arrested and that the telephone calls he had just made had been tape recorded. (Tr. 295-96). Valverde and Glasser quickly repaired to the bedroom where they emptied plastic bags of cocaine and chemicals and flushed them down the toilet. (Tr. 296-98). Piper left the apartment ten minutes later at which time the agents entered the apartment and arrested Valverde and Glasser. (Tr. 298, 575).

E. The Search of Valverde's Apartment

After the arrests Agent Hall spoke with Assistant United States Attorney Thomas M. Fortuin who prepared an affidavit for a search warrant. (Tr. 421-23).

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* These two conversations were recorded by DEA agents. Tapes and transcripts of the conversations were introduced in evidence at trial. (Tr. 292; GX 4, 4A, 4B).

At approximately 9 p.m. and after procuring a search warrant, Hall and Fortuin went to Valverde's apartment. The apartment had been secured by Special Agent Michael Gray during the absence of Hall and the other agents who had removed Glasser, Piper and Valverde to DEA headquarters and the Federal Detention Headquarters. (Tr. 300-01, 423, 576).*

Hall, Gray and Fortuin then searched the apartment. The agents found three packages of money hidden in books in the bookshelves. Two of the packages—one each found by Hall and Gray—contained approximately $3000 in cash, and a third, found by Gray, contained the identical $10,000 in serialized bills which Greenstein had paid to Piper. (Tr. 426, 583-86; GX 53, 53A, 54, 54A, 55, 55A). A chemical formula for the transformation of raw cocaine paste into cocaine hydrochloride was discovered by Assistant United States Attorney Fortuin. (Tr. 428, 582; GX 23A). In addition, a series of invoices from the Biscayne Chemical Corporation with Valverde's name on them were discovered in the apartment. (Tr. 592; GX 24).** The

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* It was during this brief period of incarceration that Glasser, in the presence of Valverde, told Piper to take the blame for their cocaine dealings by making up a story about a non-existent Brazilian friend who had come to New York and asked him to sell cocaine. Piper protested that the proposed story was incredible, but Glasser said he and Valverde would be in big trouble if he refused. Piper agreed at that time but later changed his mind. (Tr. 301).

** The office manager of the Biscayne Chemical Corporation, 1215 Northwest 17th Avenue, Miami, Florida, Miss Becky Hernandez, was called by the Government. She testified that Valverde and Glasser had come to her office on October 2, 1974 and had purchased the chemicals and chemical equipment contained in invoices which she identified as business records of Biscayne Chemi-

[Footnote continued on following page]

plastic bags which had earlier been emptied by Valverde and Glasser, but which were wet and still bore traces of cocaine, were also seized by the agents. The bags smelled of ether. (Tr. 426-27, 580-81; GX 45).*

The Defense Case

Valverde called as his only witness Peter Ottmar, the President and Treasurer of Vintage Vendors, Inc., a corporation which imported and distributed wine from Argentina, in hopes that Valverde's tenuous connection to that firm would serve to explain his livelihood and his frequent trips to South America. (Tr. 734-35). Ottmar testified that Valverde had selected wines for importation into the United States on behalf of Vintage Vendors. (Tr. 735-36, 742). Ottmar also testified that Glasser was the lawyer for Vintage Vendors and negotiated contracts, including one introduced into evidence, for the distribution rights of Argentinian wines in the United States. (Tr. 789-90; DX G). Ottmar also showed part of a 25-minute public relations film of Vintage Vendors that showed the operation of the vineyards

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cal Corporation and which were retained copies of the identical invoices seized from Valverde's apartment. (Tr. 613-18). The chemicals included acetone, ether, and hydrochloric acid, all of which were called for by the chemical formula (GX 23), as was the equipment (beakers, vacuum hose, flasks, and thermometers). (GX 24, 57).

* Piper testified that he had smelled ether when Valverde and Glasser were flushing the drugs and related chemicals down the toilet before their arrests. (Tr. 297). The relevance of the ether smell was established by another Government witness, Dr. Andrew Rice, an expert chemist of wine, who testified that the reference in the chemical formula to an ether bath meant that ether was used to wash off excess hydrochloride from the (cocaine) crystals after the transformation of cocaine from paste to cocaine hydrochloride. (Tr. 649-50).

which yielded the grapes used in the wines Vintage Vendors imported. (Tr. 748-50; DX F).

On cross-examination Ottmar admitted that Valverde had never been a director, officer, owner or employee of Vintage Vendors in contradiction to a post-arrest statement of Valverde that he was a salaried vice-president of Vintage Vendors earning $36,000 and to two business cards with Valverde's name listed as a director and vice-president of Vintage Vendors. (Tr. 758-63, 776, 823; GX 78A, 78B).

ARGUMENT

POINT I

The Search and Seizure of Evidence in Valverde's Apartment Was Proper.

Valverde complains that the participation of an Assistant United States Attorney in the search of his apartment mandates the suppression of all evidence seized and that, in any event, all evidence other than the $10,000 supplied to Greenstein by Government agents for narcotics should have been suppressed as beyond the scope of the warrant. These contentions are without merit.

The facts of the search, insofar as they are relevant to Valverde's claims, were established at a suppression hearing held on April 29 and May 1, 1975. They are as follows: After the arrest of Piper, Valverde and Glasser, at approximately 6:30 p.m., Agent Jeffrey Hall called Assistant United States Attorney Rudolph W. Giuliani, then Chief of the Narcotics Unit of the United States Attorney's Office for the Southern District of New

York, who instructed him to call Assistant United States Attorney Thomas M. Fortuin who would prepare an affidavit and search warrant for Valverde's apartment. (S. 317, 355-56). Hall spoke to Fortuin on the telephone and described the events starting with Greenstein's arrest and his cooperation, continuing through the payment of the $10,000 to Piper who carried the money into Valverde's apartment and carried cocaine out of the apartment, the conversations overheard by Hall in the apartment, and finally the arrest and cooperation of Piper and the subsequent arrests of Glasser and Valverde. (S. 317-21, 356). Based upon this information and other independent background knowledge of the case, Fortuin drafted the affidavit in support of the search warrant. (S. 318). Hall then met Fortuin at the Courthouse at approximately 7:45 p.m., when they again discussed the facts of the case, and Hall made a change in the affidavit which otherwise had been prepared by the time he arrived. (S. 321, 358-59). Hall and Fortuin then drove to the apartment of United States Magistrate Martin D. Jacobs on East 66th Street where Hall signed and swore to the affidavit, and Magistrate Jacobs signed the warrant at 9:10 p.m. (S. 322, 359). The warrant authorized a search for "money which is Official Advance Funds of the United States Government or the proceeds of a narcotics transactions [*sic*] and narcotic drug controlled substances." (App. 13a).

Hall then asked Fortuin to "come along" on the search which was to take place only three blocks from Magistrate Jacobs' apartment. (S. 322). Fortuin agreed, and he and Hall drove to Valverde's apartment. (S. 323). Agent Michael Gray, who had stayed at the apartment until Hall returned with the warrant, let Hall and Fortuin into the apartment, and the two agents and the prosecutor began to search the premises. (S. 218-19, 323, 359-60).

Agent Gray first found a French-English dictionary containing $2900 in cash at 9:25 p.m. Within fifteen minutes Gray also found *The Glory and the Lightning* containing the $10,000 of serialized funds that had been paid by Greenstein to Piper and by Piper to Valverde for cocaine and Agent Hall found *The Founding Father* containing $3090 in cash. (S. 219-23, 297, 364-65; SGX 13, 13A, 1, 12; Tr. 426, 583-85; GX 53, 53A, 55, 55A, 54, 54A). Shortly thereafter, Fortuin opened an alligator-bound briefcase looking for money and found three or four passports each of which he examined. (S. 223, 326-27, 336-37; SGX 10). Inside one of the passports belonging to Glasser, Fortuin found a piece of paper with a handwritten chemical formula. (S. 223, 326-28; SGX 8, 8-A; Tr. 428-29, 582; GX 22, 30, 23). Fortuin's attention was immediately attracted by the formula because of the conspicuous references therein to metric weights and measures, the potential evidentiary value of which was obvious to a narcotics prosecutor. A reference in the formula to ether (spelled "eather") prompted the prosecutor's conclusion that the chemical smell that he and the agents had encountered in the apartment was ether. (S. 224-25, 327). Fortuin concluded correctly that the formula was one for the refinement of cocaine or heroin and showed it to Agent Hall. (S. 223, 298, 328, 361).

The agents also recovered two pistols and some ammunition which they removed from inside a black suitcase.* They also seized ten plastic bags from inside a foldover suitcase and invoices from the Biscayne Chemical Corporation showing the purchase by Valverde of

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* One of these guns was suppressed as having been seized prior to the issuance of the warrant. (S. 218). Opinion of Judge Griesa rendered May 23, 1975 (hereinafter "Suppression Opinion"). The Government consented to the suppression of the second gun at trial. (Tr. 226).

chemical equipment (flask, beaker, vacuum hose, thermometers, stirring rods, stoppers and funnels) and chemicals (ether, acetone and hydrochloric acid) corresponding with those listed in the formula. (S. 238-39, 298; SGX 11; Tr. 592; GX 24).

After briefly looking in the kitchen, Fortuin left the apartment at approximately 10 p.m. (S. 328, 332, 372). Gray and Hall remained in the apartment and continued searching for money, narcotics and evidence until approximately midnight when they left the premises. (Tr. 298, 332-33). In addition to the above evidence, the agents ultimately seized two litigation bags and the foldover suitcase, all of which contained miscellaneous papers, notes, and the like which were reviewed by prosecutors and defense attorneys only after the return on the warrant was made. (S. 302-03).

A. The Assistant United States Attorney Properly Assisted the DEA Agents in Executing the Search Warrant.

During cross-examination of Assistant United States Attorney Fortuin at the suppression hearing, counsel for Glasser contended that "there might be a question of the legality" of someone other than an authorized agent of the Drug Enforcement Administration searching the apartment. (S. 355). Judge Griesa considered and rejected this claim below finding that Fortuin was acting in aid of Hall on his requiring it in conformity with the command of 18 U.S.C. § 3105.* (Suppression Opinion

* Section 3105 is captioned "Persons authorized to serve warrant." It provides:

> "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

at 32) (App. 276a). Relying on § 3105, Valverde renews his assertion of invalidity of the search in this Court. In doing so, Valverde ignores the clear language of § 3105 in two critical respects.

First, it is clear that the section speaks only to service of a search warrant and not to its execution. While the record does not reveal who served the warrant, it is clear that Hall and Fortuin together brought the search warrant to Valverde's apartment. (S. 218, 323, 359a).* Hall was thus present at the time of service and acted in execution of the warrant. There was thus proper service of the warrant by an agent of the DEA, (*i.e.*, Hall), the person to whom the warrant was directed.

Secondly, the statute specifically authorizes, as Judge Griesa held below, that a person acting properly in aid of an authorized officer may serve the warrant. Even if one were to assume that Fortuin possessed the warrant at the time the warrant was brought to the apartment, it is clear that he was there at the request of Hall and properly served the warrant.

Even if the statute is read as governing the execution, rather than the service, of the warrant,** Valverde's argument still must fail. It is clear that throughout

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* In light of the facts that Hall asked Fortuin to go on the search only after the warrant was signed and that it was Hall who announced himself when they went to Valverde's apartment, it is certainly reasonable to conclude that Hall had the warrant.

** This assumption seems particularly unwarranted in light of the fact that the now repealed 18 U.S.C. § 3108 governed the execution, service and return of the warrant in respects not covered by 18 U.S.C. § 3105. The provisions of § 3108 have now been incorporated into Rule 41(c) and (d) of the Federal Rules of Criminal Procedure, and nothing in these subsections supports Valverde's present contention.

the period during which Fortuin was in the apartment he was acting pursuant to Hall's request that he participate in the search. He found the chemical formula and immediately perceived both its meaning and its salient evidentiary value in a narcotics prosecution.* At other times, he was searching books in the bedrooms for more money and the kitchen for the chemicals listed in the formula. All of these activities make it clear that Fortuin was acting in aid of Hall during his stay in the apartment. As the warrant here was properly served, it was clearly proper to have Fortuin assist in the execution of the search despite the fact that he was not designated in the warrant. *United States* v. *Cox*, 462 F.2d 1293, 1306 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974); *Watson* v. *Commonwealth*, ——— Ky., 433 S.W.2d 884, 886, (Ky. 1968).**

B. The Evidence Was Properly Seized.

Valverde also claims that all of the evidence seized at the apartment, with the sole exception of the $10,000 of Official Advance Funds, should have been suppressed as beyond the scope of the warrant. Valverde contends that the other evidence seized at the apartment was not

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* The devastating consequences for Valverde were rendered even more poignant by virtue of his stipulation that the handwriting in the formula would have been identified by a handwriting expert as identical to that furnished in exemplars by Valverde to the Government. (Tr. 611).

** Finally, even assuming *arguendo* it were to be found that § 3105 had been violated, such a statutory violation would not bring into play the exclusionary rule. See *United States* v. *Burke*, 517 F.2d 377, 384-87 (2d Cir. 1975); *United States* v. *Ravich*, 421 F.2d 1196, 1201 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

Our office has advised all Assistants that, in order to avoid issues of this sort being raised in the future, they should not participate in searches.

contraband, did not incriminate him and was not evidence of narcotics activities.

With the exception of the ten wet plastics bags which the officers were fully justified in seizing and in which traces of cocaine were found (Tr. 591), the materials seized from Valverde's apartment and later introduced against him (such as the chemical formula in Valverde's handwriting) were not contraband. As the trial court found below, however, they were items "clearly and immediately recognizable as either proceeds of narcotics transactions or narcotic drug controlled substances, or evidence necessary in a narcotics case." (Suppression Opinion at 33) (App. 277a).

Under the plain view doctrine, evidence relating to criminal activity, whether contraband or simply "mere evidence", is subject to seizure. *United States* v. *Rollins*, 522 F.2d 160, 166 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *cf. Warden* v. *Hayden*, 387 U.S. 294, 300-01 (1967). In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467-68 (1971), the Supreme Court held that an item need not be contraband in order to be seized under the "plain view" doctrine where a warrant justifies, as here, the initial intrusion and where the discovery of the incriminating evidence is inadvertent. *Cf. United States* v. *Campanile*, 516 F.2d 288, 291 (2d Cir. 1975); *United States* v. *Pacelli*, 470 F.2d 67, 70 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973).

The inadvertence of the discovery of the incriminatory, non-contraband items cannot be seriously disputed. It is clear, as the trial court found, that, in looking for drugs and money, "it is not only permitted but is necessary to make as minute a search as the agents could possibly make." In searching as closely as they were required to, the trial court found that the agents and Assistant United States Attorney Fortuin

came across the formula, the passports, the chemical order forms, the plastic envelopes with the cocaine residue, and the second gun. (Suppression Opinion at 33) (App. 277a). This finding is clearly supported by the evidence.

Secondly, the items which were seized were clearly of an incriminatory character. The chemical formula for the conversion of cocaine paste into cocaine hydrochloride was of obvious significance. The passports established Glasser's and Valverde's South American junkets about which Piper testified. The chemical order forms showing Valverde as purchaser of chemicals and equipment used in the formula were further evidence of his role as a chemist in changing the cocaine paste into powder. The plastic envelopes with cocaine residue showed that cocaine had been in the apartment and supported the Government's contention that Glasser and Valverde had dumped the cocaine down the toilet when Piper informed them that the agents were outside. The litigation bags and other containers, while not incriminatory themselves, were necessarily seized in order to show the provenance of the incriminatory items.*

Valverde's contention that the search should have come to an abrupt halt after the agents found the Official Advance Funds is absurd. The agents were entitled and duty-bound by the warrant to search every nook and cranny of the apartment for drugs, money and other proceeds of narcotics transactions.

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*Moreover, the litigation bags were marked "W. F & G", circumstantial evidence that the contents belonged to Glasser, a former associate at Willkie, Farr & Gallagher. (Tr. 313).

POINT II

The Trial Court Properly Precluded Inquiry of Piper with Respect to his Posing Nude.

Valverde contends that the trial court abused the discretion he concedes it had in prohibiting defense counsel from cross-examining the Government witness Piper about a series of nude photographs of Piper and a young woman which appeared in *Viva* magazine. The contention is without merit.

During the cross-examination of the Government witness Greenstein, defense counsel attempted to question Greenstein concerning his knowledge of Piper's modeling activities and specifically of Piper's having posed in the nude and simulated sexual activity with a woman in *Viva* magazine (Tr. 144-45; DX A). The questions were propounded on a theory enunciated later by defense counsel that Greenstein's opinion of Piper's credibility might have been affected by his familiarity, or lack thereof, with Piper's posing.* The trial judge sustained objection to this inquiry, expressing the view that "if there is anything relevant about Piper's character that is going to come in, you are not going to be permitted to malign and abuse Piper *per se* . . . ." (Tr. 146).

When Piper took the stand, counsel for Valverde again sought to cross-examine on the *Viva* pictures, claiming that Piper's willingness to pose nude was a

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* Counsel apparently had reference to Rule 608(b)(2) of the Federal Rules of Evidence which allows cross-examination of a witness "concerning the character for truthfulness and untruthfulness of another witness as to which character the witness being cross-examined has testified." Greenstein had not, however, testified about Piper's character.

matter which affected his credibility. Fed. R. Evid. 611(b). Judge Griesa disagreed, citing Rule 403 of the Federal Rules of Evidence,* and excluded the evidence on the grounds that, even if relevant,** the evidence should be excluded because its probative value was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, and misleading the jury. Moreover, in the face of Valverde's claim that Rule 403 was intended only to protect defendants (Tr. 224), Judge Griesa ruled that in the required exercise of reasonable control over the interrogation of witnesses, the matter would be excluded in order to protect the witness from harassment and undue embarrassment. Fed. R. Evid. 611(a).***

It is clear from the foregoing that there was no abuse of discretion on the part of the trial judge, a clear showing of which is required before a ruling on the admissibility of evidence, the relevancy of proffered evidence, and the scope of cross-examination may be over-

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* Rule 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

** Judge Griesa's earlier comments, *supra* at 21, indicated that he thought Piper's nudity was irrelevant to the question of credibility. He repeated his doubts on that point as follows:

"I think it comes within Rule 403, and I really do not see that evidence about whether he posed in the nude or posed in acts of fornication really gives any indication that he is mentally or emotionally incapable of telling the truth or prone not to tell the truth." (Tr. 223-24).

*** Rule 611(a) provides: "Control by court—The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

turned on appeal. *United States* v. *Lind*, Dkt. No. 76-1213, slip op. 149, 151 (2d Cir., Oct. 15, 1976); *United States* v. *Corr*, Dkt. No. 76-1115, slip op. 5891, 5909 (2d Cir., Oct. 22, 1976) (exclusion of evidence); *Hamling* v. *United States*, 418 U.S. 87, 124-25, 127 (1974) (admissibility of evidence); *United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974), relevancy of proffered evidence); *Alford* v. *United States*, 282 U.S. 687, 694 (1931) (scope of cross-examination); and *Hamling* v. *United States*, *supra*, 418 U.S. at 127 (collateral issues causing confusion). Piper's posing naked with a woman, even in suggestive sexual poses, obviously did not constitute a specific instance of conduct probative of truthfulness or untruthfulness. Fed. R. Evid. 608(b). No showing was made to the trial court by Valverde that the conduct bore on his ability to tell the truth.* Accordingly, it was properly excluded as irrelevant.

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* Valverde's contention that Piper's posing naked in a magazine constitutes a crime is frivolous. The photographs of Piper do not constitute the intentional indecent exposure proscribed by Section 240.00 of the New York Penal Law. *Cf. Excelsior Pictures Corp.* v. *Regents of University of State of New York*, 3 N.Y. 2d 237, 244-45, 165 N.Y.S. 2d 42, 47-48 (1957). (Construes predecessor statute). Nor do the photographs violate § 245.11 of the Penal Law which by its terms and intent is directed at "displayers" of obscene material, such as magazine and newspaper vendors.

Moreover, if Piper's posing constituted evidence of a crime for which he had never been charged or convicted, that would not render the evidence admissible. It has long been settled in this Circuit that proof of criminal conduct for which there has not been a conviction is inadmissible to impeach a witness' credibility absent a judgment of conviction. See, *e.g.*, *United States* v. *Rosa*, 360 F.2d 1, 14-15 (2d Cir. 1966), *cert. denied*, 385 U.S. 961 (1966). While Rule 608(b) has created limited exception to that principle of law, that exception applies only when the criminal conduct is probative of the witness' character for truthfulness. Plainly, Piper's posing was not probative on the question of truthfulness.

The judge was correct, moreover, in excluding the evidence under Rules 403 and 611. Assuming its relevance, the evidence would have focused the attention of the jury on lurid sexual motifs instead of the issues which were joined at trial—whether Valverde and Glasser sold cocaine. The Advisory Committee's Note to Rule 608(b) make it clear the Rule 403 and Rule 611, to which the trial court also referred, are to be read in conjunction with subsection 608(b).* This is precisely what the trial court did, and its ruling should not be disturbed.

The defense below, in addition, had abundant impeachment material of varying kinds which it used in examining Piper. As an accomplice who had pleaded guilty and was awaiting sentence, he was examined extensively on his currying favor with the Government. (Tr. 350-51), 355-59, 362-63, 382-86). Piper had written a short story about his experiences selling and using cocaine, and that text, which was described as "semi-autobiographical" (Tr. 345), as well as other fiction written by Piper and the scripts Piper learned in his acting career were all explored by defense counsel. (Tr. 345-49, 367-70). Piper's spotty employment record (Tr. 365-70) and educational history (Tr. 310-17) were examined. Fianlly, Piper was asked about his jealousy of and hostility towards Glasser, his brother-in-law, because Piper's stepfather, an attorney, esteemed Glasser's and not Piper's talents. (Tr. 388-91). The extent and variety of this cross-examination of Piper about his

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* Valverde is incorrect in his assertion that Rule 103(b) is meant to provide protection only to the defendant and not to the Government. A reading of the plain language of the Rule admits of no such construction, and decisions of this Court certainly would not support such a reading. See *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976).

character and motives renders the argument that the defense was improperly restricted both insubstantial and unconvincing. See *United States* v. *Pacelli*, 521 F.2d 135, 137-38 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

POINT III

The Trial Judge Properly Charged the Jury on the Credibility of Accomplice Witnesses.

Valverde claims that Judge Griesa erred in declining to charge that the jury might consider the prior convictions of Piper and Greenstein as bearing on their credibility. Specifically, after the charge was given, defense counsel requested the following supplemental charge:

> "In considering the testimony of a witness or witnesses you are entitled to take into consideration his admission of conviction of crimes committed by him as affecting his credibility as a witness." (Tr. 944).

The only evidence addressed at trial that Piper or Greenstein had been convicted was that both had pleaded guilty because of their role as accomplices in the instant case. Judge Griesa properly and fully charged the jury on the subject of accomplice testimony as follows:

> "The Government has called as witnesses, as you know, Eugene Piper and Steven Greenstein. These are defendants named in the case. They were accomplices in the very crimes charges in the indictment.
>
> I instruct you that in the prosecution of crime the Government is frequently called upon to use

witnesses who are accomplices or witnesses with prior criminal activities and records. Often the Government has no choice, and the Government must rely on witnesses to transactions such as they are. The Government, obviously, in many cases could not successfully prosecute crimes if it could not rely on the testimony of such persons.

However, I instruct you that the testimony of an accomplice witness should be received with caution and weighed with care by the jury.

Again, there is nothing automatically or inherently untrustworthy about the testimony of an accomplice, but it is for you to weigh that testimony carefully and scrutinize it carefully and with caution before accepting it.

Let me say further that the Government is not required as a matter of law to corroborate the testimony of accomplice witnesses. However, the Government contends that the testimony of these accomplice witnesses is substantially corroborated." (Tr. 935-36).

This instruction more than adequately stated the law with respect to accomplish testimony, and Valverde was entitled to no more. See, *e.g.*, *United States* v. *Araujo*, 539 F.2d 287, 290 (2d Cir. 1976); *United States* v. *Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975). The jury was also properly instructed that they were the judges of the facts, that their recollection of the facts governed (Tr. 910-11), and that they should carefully evaluate the credibility of the witnesses. The judge also charged that the jury should consider defense contentions about the witnesses' credibility (Tr. 924-32), and that they should weigh all the evidence in deciding whether the Government had carried its burden. (Tr. 951).

The jury was thus properly charged on all matters regarding the credibility of the accomplices who testified. Valverde's redundant request that the jury be instructed to consider the felony convictions of Greenstein and Piper in the instant case merely restated the technical outcome of the crimes which Piper and Greenstein had freely and unequivocally admitted on the stand. Accordingly, there was no error.*

POINT IV

The Government's Summation Contained No Improper Argument.

Valverde claims for the first time on appeal that the prosecutor's summation was improper because it (1) commented on the defendant's failure to introduce evi-

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* In rejecting the request for the supplemental instruction, Judge Griesa, commented:

"The Court: If I am required to give it I want to give it, but I don't know of any requirement that I have to single out—frankly, I think from any sensible standpoint the issue about his conviction here, and the only conviction that is in the record, the issue about his conviction is whether he is testifying falsely in order to buy favors, and that was gone into to a fare-thee-well in the summations, and I told the jury, I specifically said that they were to consider whether he has got an interest in the outcome of the case, and I told them on the accomplice testimony to scrutinize it carefully, and I believe it would not add a thing in any sense, so I won't give that.

Now what about the accomplice testimony?

Mr. Rothblatt: I think your Honor is missing my point——

The Court: I am not missing it.

Mr. Rothblatt: it deals with the credibility of a person convicted of a crime independent of his being an accomplice.

The Court: But that doesn't make any sense here." (Tr. 945-46).

dence; (2) expressed a personal opinion about the evidence; and (3) made inflammatory remarks.* The contention that these remarks warrant reversal of Valverde's well-merited conviction is frivolous.

The assertions of impropriety on this appeal should be inspected with suspicion in view of the absence of specific objection at trial to any of the prosecutor's remarks now claimed to have been so prejudicial. This failure to object constitutes a waiver of the claims and reflects their insubstantiality. *United States* v. *Canniff*, 521 F.2d 565, 571-72 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *cf. United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 238-39 (1940).

A. The Prosecutor Did Not Comment Improperly on the Defendant's Failure to Produce Evidence.

In his initial summation, the Assistant United States Attorney challenged defense counsel to explain the fact that the $10,000 in pre-recorded Government funds which Piper paid Valverde was found in books in Valverde's apartment during the post-arrest search.* In his re-

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* The text of the relevant portion of the prosecutor's summation is as follows:

> "What in the world was $10,000 of pre-recorded money doing in the Glory & The Lightning, which went on a familiar course from the agents on down to Valverde? I will trace that in a minute.
>
> I would like an explanation, I really would, as to what the $10,000 of pre-recorded funds was doing inside *The Flory* [*sic*, should be *Glory*] & *The Lightning* when the agents searched that apartment pursuant to a search warrant? I would like to hear it. Beyond that, of course,

[Footnote continued on following page]

buttal summation, the prosecutor called attention to the fact that this invitation to offer any explanation of the $10,000 had been declined by the defense.

The argument of the prosecutor was not directed at the failure of the defendant to testify, *Griffin* v. *California*, 380 U.S. 609 (1965), rather, it was directed at the failure of the defense to present any evidence or explanation rebutting what was plainly devastating evidence of his guilt. It would doubtless benefit defendants if prosecutors were prohibited from pointing out to jurors that the defense had offered no rebuttal to evidence of this sort. However, the law bestows no such bounty.

The law is well-settled that the Government may comment on the defense's failure to introduce evidence contradicting the Government's case. *United States* v. *Rodriguez*, Dkt. No. 76-1188, slip op. 6037, 6042-43, (2d Cir. Nov. 30, 1976). See *United States* v. *Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). See also *United States* v. *Noah*, 475 F.2d 688, 695-96 (9th Cir.), *cert. denied*, 414 U.S. 1095 (1973); *United States* v. *Gray*, 464 F.2d 632, 637 (8th Cir. 1972). Such remarks are only objectionable when the jury would "naturally and necessarily" view them as a comment on the defendant's failure to take the stand. See *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970). As Judge Friendly, quoting from *Lefkowitz* v. *United States*, 273 F. 664,

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we had another $3000 in *The Founding Father*. Joseph Kennedy would be pleased.

And we had the French dictionary with another $3000. Again why was this money hiden [*sic*]. Why was it hidden? I think the answer is perfectly clear. It was the proceeds of narcotics transactions along with the $10,000, and they didn't know which money was marked and so they hid it all.

And I don't think those books came from anywhere except the bookcases in that apartment." (Tr. 856-56a).

668 (2d Cir.), *cert. denied*, 257 U.S. 637 (1921), stated in *Leak*, *supra*:

> "'It is only objectionable to comment upon the failure of the defendant to testify; and if at the close of the whole case any given point stands uncontradicted, such lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell.'" *Id.*

Here, the prosecutor's remarks were not intended, nor can they objectively be viewed, as a comment on Valverde's failure to take the stand.*

B. The Prosecutor Did Not Express a Personal Opinion About the Evidence

Valverde also argues (Br. 26, 42) that the prosecutor expressed a personal opinion about the evidence when he stated:

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* Valverde similarly complains about the prosecutor's argument that, if there was any question that the chemical formula found in the apartment was not for the conversion of cocaine paste to cocaine hydrochloride, the defense would have called their own chemist. (Br. at 41). The Government had called Dr. Andrew Rice, an oenologist, who established the meaning of the formula. Defense counsel then claimed in his summation that Dr. Rice testified that the formula concerned crystalization of wine residues and spoilage, two propositions Dr. Rice's testimony clearly refuted. (Tr. 703-05, 870-71). The prosecutor's comment merely emphasized the defendant's failure to shake Dr. Rice's testimony on cross-examination or to produce any expert testimony to contradict Dr. Rice. It was not improper, therefore, for the Government to state—in the face of defense claims that the formula meant "absolutely nothing" (Tr. 734) and in response to a wholly misleading argument by defense counsel that the defense could have called their own expert to establish the matters they had so manifestly failed to prove in cross-examining Dr. Rice—See *United States* v. *Tramunti*, 513 F.2d 1087, 1119 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Dioguardi*, 492 F.2d 70, 82 (2d Cir.), *cert. denied*, 419 U.S. 87 (1974).

> "And I don't think these books came from any where except the bookcases in the apartment."

Valverde contends that in delivering this remark the prosecutor "interjected the prestige of the United States Attorney's office into the fact finding process by becoming an unsworn Government witness . . . ." (Br. 42).

When the remarks are placed in their proper context, it becomes clear that the prosecutor was simply discussing an inference which could be drawn from the evidence, as he was fully entitled to do. See *United States* v. *Morell*, 524 F.2d 550, 557 (2d Cir. 1975); *United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975); *United States* v. *White*, 186 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974). The sentence asserted to contain the prosecutor's opinion, illuminated by what preceded it and what followed it, reads:

> "And we had the French dictionary with another $3000. Again why was this money hidden. Why was it hidden I think the answer is perfectly clear. It was the proceeds of narcotics transactions along with the $10,000, and they didn't know which money was marked and so they hid it all.
>
> And I don't think those books came from anywhere except the bookcases in that apartment.
>
> Is there any *evidence* they did? Do we have any *evidence* that Mr. Piper was a voracious reader? Do we have any *evidence* that he carried around books in his model portfolio? No *evidence* at all." (Tr. 856-57) (emphasis supplied)

These remarks, viewed in context as they must be, *United States* v. *Bivona*, 487 F.2d 443, 446-47 (2d Cir. 1973), were reasoned and temperate argument of an inference wholly sustained by the evidence.

C. The Prosecutor Did Not Make Inflammatory Remarks

Finally, Valverde attacks the prosecutor's statements in summation that Valverde and Glasser were "the high rollers of the drug traffic in this city" (Tr. 857) and "large dealers on an international scale" (Tr. 907-08). These characterizations, however, were fully supported by the evidence in this case which showed that, *inter alia*, the defendants Valverde and Glasser lived in New York's finest hotels dealing cocaine, (Tr. 243, 248-49), had gone to Bolivia where they dealt with a cocaine chemist and dealer (Tr. 252-53), had purchased sufficient hydrochloric acid to process 24 kilograms of raw cocaine (Tr. 650-51; GX 57), sold cocaine that was 96.8% pure (Tr. 573-74), owned an airplane worth $34,000 (Tr. 592; GX 39), and traveled frequently between South America and the United States. Under these circumstances, the descriptions were accurate and unobjectionable. See *Myers* v. *United States*, 49 F.2d 230, 231-32 (4th Cir.), *cert. denied*, 283 U.S. 866 (1931).

POINT V

Glasser's Post-Arrest Statements to Piper Made in Valverde's Presence Were Properly Received Against Valverde.

Piper testified that Glasser, in Valverde's presence, asked Piper to make up a story that would exculpate both Glasser and Valverde. Valverde complains that this testimony should not have been admitted against him and that the trial court's refusal to give a limiting instruction justifies reversal of his conviction. This argument is without merit.

After Piper was arrested, he was warned of his rights by DEA agents and then asked to cooperate. Piper then made two phone calls to Glasser and Valverde designed to elicit inculpatory statements. (Tr. 291-92, 417-19, 575; GX 4, 4A, 4B). Thereafter, Piper returned with the agents to Valverde's and Glasser's apartment and was told by Group Supervisor Hall to tell Valverde and Glasser that he was going to wait there a few minutes before meeting with his customer in the vicinity to be paid.* Hall explained to Piper that he wanted Piper to enter the apartment, pretend that nothing unusual had occurred, and leave ten to fifteen minutes later at which time the agents would enter the apartment without having to knock the door down. (Tr. 295, 420). Instead, Piper entered the apartment and told Valverde and Glasser that the jig was up. Glasser and Valverde thereafter began to conceal or dispose of drugs, hydrochloric acid, money and other incriminating items. (Tr. 294-96). The agents then entered the apartment and placed everybody under arrest. (Tr. 298, 421).

Thereafter, Valverde, Glasser and Piper were lodged at the Federal Detention Headquarters on West Street. The following morning, while Valverde, Glasser and Piper were together in a cell block, Glasser told Piper to tell the authorities that he had gotten the cocaine from an acquaintance of his in Brazil ** whom he had met in New York and that if he failed to do that, Glasser and Valverde would be in real trouble.***

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* A similar ruse was employed during the telephone conversations.

** Piper spent two months in Brazil in early 1974 working on a screenplay. (Tr. 245).

*** The testimony with respect to this incident is as follows:

"Q. Now directing your attention to the following morning, Mr. Piper, did you have a conversation with Mr. Glasser and Mr. Valverde? A. Yes.

* * * * *

[Footnote continued on following page]

Valverde relies on Judge Friendly's opinion in *United States* v. *Flecha*, 539 F.2d 874 (2d Cir. 1976) as authority for his contention that Valverde's silence during Glasser's conversation could not be construed as adoptive of the chicanery which Glasser propounded. This reliance ignores, however, two controlling distinctions between the facts here and those in *Flecha*.

First, the statement in *Flecha* was made in front of law enforcement officers and thus there was no incentive

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Q. Mr. Piper, you were under arrest at that time, were you not? A. Yes.

Q. And Mr. Glasser, and Mr. Valverde were as well, is that correct? A. Yes.

Q. When did this conversation take place? A. In one of the cell blocks in the West Street Prison.

Q. Mr. Glasser and Mr. Valverde had been arrested just after you opened the door to the apartment, is that right? A. Yes.

Q. Now what was the conversation you had with Mr. Glasser and Mr. Valverde the following morning? A It was suggested by——

The Court: Who suggested? Who said what?

The Witness: If I may explain that, your Honor, Mr. Glasser suggested to me with Mr. Valverde present that I take the brunt of what was happening by constructing a story.

Q. What story was that? A. That I had met somebody when I was in Brazil and that he had called out of the blue and said that he had some—he was in New York and had cocaine and would I sell it for him.

Q. And did you say anything in response to that? A. I said that nobody would believe that.

Q. And did Mr. Glasser or Mr. Valverde tell you anything else? A. Mr. Glasser said that if I didn't do it, that they would be in big trouble.

And I said that I would.

Q. You said that you would do it? A. I said that I would." (Tr. 298, 300-01).

to speak and good reason not to. Secondly, the statement * in *Flecha* was an utterance that did not in any way call for any response from Flecha, and, as Judge Friendly found, it was "far more natural to say nothing." *Id.* at 877.

The statements made by Glasser to Piper, on the other hand, while made in a custodial setting, were not made in front of a law enforcement officer. Glasser, Valverde and Piper—long time friends—were alone in a cell block and were plotting secretly to forestall an investigation and prosecution. The story that Glasser wished Piper to tell was known to Valverde to be false, but he did not challenge Glasser's suggestion to Piper that he fabricate the story. Moreover, Glasser explicitly stated that if Piper failed to make up the story about the non-existent Brazilian, "they" (meaning incontrovertibly Glasser *and Valverde*) would be in "big trouble". To that extent, Glasser was clearly speaking on behalf of Valverde; Valverde, on the other hand, was clearly at liberty to disassociate himself from the scheme which Glasser proposed and to which Piper assented. There was no police officer, agent, or prison guard in the cell with them, and Valverde could easily have repudiated Glasser without doing anything else to attract the atten-

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* In *Flecha*, all of the defendants were arrested together, and as they were standing in line, one defendant said to Flecha, "Why so much excitement. If we are caught, we are caught." *Id.* at 876.

tion of third parties.* Admissions made under similar circumstances were only recently found by this Court to have been adopted. *United States* v. *DiGiovanni*, Dkt. No. 76-1097, slip op. 437, 442-43 (2d Cir., Nov. 9, 1976).

Secondly, Glasser's remark that "they" (meaning unquestionably himself and Valverde) would be in big trouble, made it plain that Valverde was to benefit equally from the false story that Piper was urged to tell. The circumstances were such, therefore, that dissent from the plan would have been expressed if the plan had not been one desired by Valverde. See Advisory Committee Note to Fed. R. Evid. 801(d)(2)(B). If Valverde had thought the scheme wrong or even wrongheaded, he was free, and had every incentive to say so. Valverde lacked neither the opportunity nor the motive to disavow Glasser's and Piper's scheme, and thus the statements were properly admitted. 4 Wigmore, Evidence § 1071, at 106 (Chadbourne rev. ed. 1972).**

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* Valverde contends on appeal that he knew that Piper was a "cooperating Government agent" (Br. 44) and supports this with the unsupported statement in his statement of facts that Piper reappeared after his arrest in Valverde's apartment "in the guise of a Government agent", (Br. 19) suggesting that Piper wore a badge so identifying himself. The evidence is clear that Piper was not cooperating with the agents at the time of the jail conversation between Glasser and Piper (Tr. 295-96, 336). Piper had made some phone calls on behalf of the agents the day before but he stopped cooperating when he warned Glasser and Valverde that the agents were outside giving them a chance to destroy evidence. Moreover, even if Valverde suspected that Piper was an informant, he would not have allowed him to stand mute in the face of the certainty that Glasser's corrupt importunings would be reported to authorities.

** The standard adopted in *Flecha* was that of Lord Justice Bowen in *Wiedemann* v. *Walpole*, 2 Q.B. 534, 539 (1891), that silence is not an admission "unless there are circumstances which

[Footnote continued on following page]

render it more reasonably probable that a man would answer the charge made against him than that he would not." 539 F.2d at 877. It is plain, we submit, that on the facts of this case it is more likely than not that had Valverde been innocent he would have protested Glassier's remarks. And in any event, this is an issue best left to the informed discretion or the trial court. Fed. R. Evid. 401.

Valverde does not cite *United States* v. *Lam Lek Chong*, Dkt. No. 75-1435, slip op. 5725 (2d Cir., Sept. 27, 1976), which, at first glance, may appear to support his position. There, conspirator Lam introduced LiGanoza to undercover agents as a nephew of Lam's heroin supplier and said that the supplier had been convinced to scale down his demands for an advance payment for a certain heroin shipment. Further negotiations occurred at the meeting, but LiGanoza never uttered a word.

The Government contended on appeal that LiGanoza had adopted, by his silence, Lam's statements implicating him, and that this adopted admission together with other evidence satisfied the *Geaney* standards as to LiGanoza. This Court, in the text, indicated that it was unnecessary to resolve the question whether there had been an adopted admission, since the other non-hearsay evidence of LiGanoza's involvement was sufficient. *Id* at 5735. Then, in a footnote, however, after discussing *United States* v. *Flecha*, the Court said, "we cannot agree that [LiGanoza] specifically acquiesced in Lam's statements . . ." *Id.* n. 20.

It is difficult to believe that the Court's conclusion that LiGanoza had not "specifically acquiesced" in Lam's statements was intended as a rejection of the Government's adoptive admission contention. This is so, first, because an adoptive admission never involves specific acquiescence, second, because it would be extraordinary for the Court to leave open an issue in the text which it then went on to resolve in a footnote, and, third, because it would be almost impossible to reconcile such a ruling with the Court's previous decision in *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976), a case which involved similar facts. Finally, *Lam Lek Chong* certainly cannot, in any event, be read as going beyond the holding in *Flecha* and ruling that, before an adopted admission can be introduced, something more is required than a finding that it is more likely than not that a response would have been forthcoming had the statement been untrue. In the present case, it is clear that *Flecha's* standard was met.

In any event, the testimony could not possibly have harmed Valverde, since the evidence against Valverde was overpowering. Piper's testimony concerning Valverde's involvement was corroborated in virtually all respects, most powerfully by the surveillance of Piper when he brought the $10,000 in serialized bills to Valverde's apartment and by the evidence gathered in the post-arrest search— the serialized $10,000, in addition to more than $6,000 in other cash, found in bookshelves, the residue of cocaine found in plastic bags, and the chemical formula in Valverde's handwriting for the transformation of substances such as cocaine into hydrochloride form. Accordingly, any error in the admission of the evidence against Valverde was harmless. See *United States* v. *Flecha*, *supra*, 539 F.2d at 878.

POINT VI

Agent Hall's Overhearing of the Conversation among Valverde, Glasser, and Piper Did Not Violate Valverde's Fourth Amendment Rights.

Valverde asserts that the trial judge should have stricken testimony of Agent Hall about a narcotics-related conversation he overheard among Valverde, Glasser, and Piper while standing outside the door to Valverde's and Glasser's apartment. This claim, premised on an erroneous allegation that the overhearing of the conversation violated Valverde's Fourth Amendment rights, should be rejected.

At the suppression hearing held more than seven months prior to trial, Agent Hall testified that he followed Piper to 205 W. 63rd Street where he observed that one of the elevators had gone to the fifth floor. Hall then went to the fifth floor himself, listened at the doors

of several apartments on the fifth floor, hoping to locate Piper, until he reached 5-D, Valverde's apartment, when he overheard snatches of conversation (S. 340-42).*

Hall repeated the substance of this testimony, without objection on Fourth Amendment grounds, at the trial. (Tr. 404-06).** He was thereafter cross-examined by the attorney for Glasser who established that Hall had his ear pressed to the door of the apartment when he overheard the bits and pieces of conversations. (Tr. 434, 454).

At the close of the Government's case, the defendants moved to strike Hall's testimony, which was by itself a mere fillip to the Government's overwhelming case, on the grounds that the evidence had been obtained in violation of the constitutional rights of Glasser and Valverde. The trial judge stated that he would not strike the Hall testimony because the application with respect to it was untimely, and the point had been waived. (Tr. 729). Contrary to Valverde's suggestion that the matter was treated solely as a waiver (Br. at 45, 47), however, the trial judge also held that there was no violation of the Fourth Amendment as there was probable cause both to arrest Piper and to believe that there was a narcotics-related conversation going on in Valverde's apartment. (Tr. 730-31).

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* Hall's testimony was as follows:

"I recall one man asking another man when a load or a shipment was coming in. He referred to him as Joe. And I overheard the response, the date March 10th. I also overheard the words four grams. I also overheard other parts of conversations, other words, but I don't recall them at this time clearly." (S. 342).

** Counsel for Valverde objected to the admissibility of the evidence in the absence of testimony by Hall that he could identify the voices he heard. (Tr. 405). This claim has been abandoned on appeal.

Judge Griesa correctly denied defendants' application. First, it is clear that there was no intrusion on any protected privacy interest. The sounds coming from the apartment were audible to a person using nothing more than his naked ear, and, accordingly, the defendants exposed their conversation to the public. *United States* v. *Fisch*, 474 F.2d 1071, 1076-78 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973). *Cf. United States* v. *West*, 494 F.2d 1314. 1315 (2d Cir. 1974); *United States* v. *Ortega*, 471 F.2d 1350, 1361 (2d Cir.), *cert. denied*, 411 U.S. 948 (1973); *United States* v. *Llanes*, 398 F.2d 880 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969); *United States* v. *McLeod*, 493 F.2d 1186, 1188 (7th Cir. 1974); *United States* v. *Fuller*, 441 F.2d 755 (4th Cir. 1971); *United States* v. *Boyd*, 407 F. Supp. 693, 694 n.2 (S.D.N.Y. 1976) (Weinfeld, *J.*); *but cf. United States* v. *Case*, 435 F.2d 766, 768 (7th Cir. 1970) (defendant had privacy interest in locked hallway from which conversation was overheard). This proposition was squarely within the reasoning of *Katz* v. *United States*, 389 U.S. 347, 351 (1967) ("The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.") And in any event, Judge Griesa correctly found that the failure to assert this claim prior to trial was not justifiable and therefore constituted a waiver. See, *e.g.*, *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, — U.S. — (1976). Finally, if there was any error in admitting this comparatively innocuous testimony, it was surely harmless. *United States* v. *Head*, Dkt. No. 76-1249, slip op. 647, 650 (2d Cir. Nov. 29, 1976).

CONCLUSION

The judgment of conviction should be affirmed.

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS E. ENGEL, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of December, 1976 he served a copy of the within Brief (two copies) by placing the same in a properly postpaid franked envelope addressed:

Gustave H. Newman, Esq.
522 Fifth Avenue
New York, New York 10036

An deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borought of Manhattan, City of New York.

Thomas E. Engel

THOMAS E. ENGEL

Sworn to before me this

23rd day of December, 1976

LAWRENCE FARKASH
Notary Public, New York State
No. 24-4606580
Qualified in Kings County
Comm. Expires March 30, 1977